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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33644

TONGUE RIVER RAILROAD COMPANY, INC.—ACQUISITION AND OPERATION EXEMPTION—TONGUE RIVER RAILROAD COMPANY

Decided: November 9, 1998

BACKGROUND

On September 18, 1998, Tongue River Railroad Company, Inc. (TRRC Inc.) filed a verified notice of exemption under 49 CFR 1150.31 from the provisions of 49 U.S.C. 10901 to acquire from Tongue River Railroad Company (TRRC or Partnership) (collectively applicants)¹ Partnership's existing transportation assets, including the previously issued Interstate Commerce Commission (ICC) and Board permits to construct and operate lines of railroad between Miles City and Decker/Spring Creek, MT. Once constructed, TRRC Inc. will operate approximately 120 route miles from milepost 0.0 at Miles City, to Spring Creek, which will be milepost 114.8, if constructed over the Western Alignment,² or milepost 126.9, if constructed over the previously approved Four Mile Creek Alternative. The line will also include the Otter Creek Spur, running from milepost 68.3, at Ashland, MT, to Terminus Point #2, approximately 7.7 miles southeast of Ashland in the Otter Creek Drainage. TRRC Inc. will become a Class II rail carrier upon commencement of operations. Notice of the exemption was served and published in the Federal Register (63 FR

¹ All of the common stock of TRRC Inc. will be owned by Partnership, which is a Montana limited partnership. The sole purpose of the transaction is to convert the entity that will construct and operate the Tongue River Railroad Company from a partnership to a corporation in order to facilitate certain transactions that will need to be undertaken in order to exercise the construction and operation authority previously granted in Tongue River Railroad Company - Rail Construction and Operation - in Custer, Powder River and Rosebud Counties, MT, Finance Docket No. 30186, et al. (ICC served May 9, 1986) (the 1986 decision) and Tongue River Railroad Co.--Rail Construction and Operation--Ashland to Decker, Montana, Finance Docket No. 30186 (Sub-No. 2) (ICC served Nov. 8, 1996) (the 1996 decision).

² Authority to construct the Western Alignment is the subject of the pending application in Tongue River Railroad Company--Construction and Operation--Western Alignment, STB Finance Docket No. 30186 (Sub-No. 3) (Western Alignment) (collectively with Finance Docket Nos. 30186 and 30186 (Sub-No. 2), the Tongue River cases).

54186) on October 8, 1998. The exemption is scheduled to become effective on November 17, 1998.

On September 25, 1998, the City of Forsyth, MT, the United Transportation Union-Montana State Legislative Board and the United Transportation Union-General Committee of Adjustment, two subordinate units of the United Transportation Union (Forsyth/UTU), and the Northern Plains Resource Council Inc. (Northern Plains) (collectively petitioners) filed petitions to stay the operation of the notice of exemption pending their filing of petitions to reject or to revoke, and the Board's consideration of issues related to those filings. Forsyth/UTU and Northern Plains filed petitions to reject the notice of exemption and/or to revoke the exemption on September 30, 1998, and October 7, 1998, respectively.³ Applicants filed a consolidated reply to the petitioners' petitions for stay and Forsyth/UTU's petition to reject and/or revoke on October 2, 1998, and replied to Northern Plains' petition to reject or revoke on October 20, 1998.⁴

This decision declines to reject the notice of exemption or revoke the exemption in this proceeding and dismisses the petitions to stay as moot.

DISCUSSION AND CONCLUSIONS

Rejection of the Notice of Exemption.

The Board may reject a document submitted for filing if the Board finds that the document does not comply with its rules. 49 CFR 1104.10. Also, to warrant rejection of a notice of exemption, a petitioner may demonstrate that the notice contains false or misleading information.⁵

Petitioners argue that we should reject the notice on the grounds that: (1) the notice omitted the caption summary as required by 49 CFR 1150.32(a); (2) the transfer of construction and operation permits by noncarriers is not within the Board's jurisdiction under 10901; and (3) the transaction is outside the scope of the class exemption at 49 CFR 1150.31.

Specifically, petitioners allege that TRRC Inc. failed to submit a caption summary along with its notice of exemption on September 18, 1998. Petitioners maintain that they were prejudiced by TRRC Inc.'s failure to provide the required caption summary, as the proposal could not be fully

³ Northern Plains indicates that it has incorporated by reference and advances each and every ground of the Forsyth/UTU petition of September 30, 1998.

⁴ Applicants indicate that they have incorporated by reference their previously filed consolidated reply of October 2, 1998, into their reply to Northern Plains' petition of October 7, 1998.

⁵ Under 49 CFR 1150.32, an exemption is void ab initio if it contains false or misleading information.

understood.⁶ We disagree. Contrary to petitioners' allegation, the Board received applicants' notice of exemption and a caption summary on September 18, 1998. Thus, applicants complied with the Board's rules at 49 CFR 1150.34. The copies of the caption summary that should have been with the notice of exemption on public display in the Board's Public Docket Room and also with DC News & Data, Inc. were inadvertently misrouted within the Board. However, when the problem was brought to the Board's attention by the applicants' representative, the copies immediately were located, and the copies of the caption summary immediately were put on display with the notice of exemption. The record does not support a finding that the petitioners were prejudiced due to failure to receive a copy of the caption summary. Petitioners' preliminary statement in their petition to reject or to revoke accurately summarizes the very information they claim that, without the caption summary, "cannot be fully understood." Moreover, there is nothing in a caption summary that is not also provided in the notice of exemption. The caption summary is a technical requirement which the Board's staff uses to expedite publication of the Federal Register notice to the public. It does not provide additional details of the transaction, as petitioners suggest.

Petitioners argue that, because neither TRRC Inc. nor Partnership is a carrier, Partnership cannot transfer its rail construction and operation permits under 49 U.S.C. 10901. Accordingly, petitioners maintain that the certificate must be canceled and that a fresh certificate of public convenience and necessity should be issued for all of the Tongue River cases. Applicants counter that because 49 U.S.C. 10901 provides that "a person" may construct a line of railroad or provide transportation over such line only if authorized to do so by the Board, it is reasonable to conclude that TRRC Inc.—which is legally a separate "person" from Partnership even though its stock is owned by Partnership—should obtain Board authorization before proceeding with the transaction.

We agree with applicants that entities other than a rail carrier, such as a partnership or a corporation, must seek authority from the Board to construct and/or operate a rail line. Having obtained authority to construct and/or operate a rail line, we see no reason why such persons should not be able to transfer construction and operation permits. Because applicants are only changing their business structure, however, there is no merit to petitioners' claim that applicants should go through the full blown application process rather than being allowed to transfer their permits to the new entity resulting from their corporate restructuring.

We also find without merit, petitioners' contention that, assuming arguendo that the Board has transfer jurisdiction under section 10901, the transaction does not qualify for the class

⁶ On October 5, 1998, Forsyth/UTU filed a petition for leave to file a reply to a reply. Applicants filed their opposition on October 7, 1998. The petition is an effort by Forsyth/UTU to further elaborate on the issue of the alleged failure of applicants to provide a caption summary to the Board. The Board's rules do not permit a reply to a reply. 49 CFR 1104.13(c). Good cause for waiving the rule has not been shown by petitioners. Thus, the petition will be denied. However, the issue of the caption summary as it pertains to petitioners' arguments for rejection will be discussed further in this decision.

exemption at 49 CFR 1150.31 that applies to acquisitions and operations under section 10901. Petitioners maintain that, since there is no rail line in existence, there is nothing that can be acquired or operated. But, as applicants state, the class exemption applies to all acquisitions and operations under section 10901. 49 CFR 1150.31(a). Moreover, the Board has defined the use of the term “acquisition” in the section 10901 class exemption broadly to include all forms of transactions for the transfer of, or right to operate over, a rail line. See Acquisition of Rail Lines Under 49 U.S.C. 10901 and 10902—Advance Notice of Proposed Transactions, STB Ex Parte No. 562, slip op. 1 n.1 (STB served Sept. 9, 1997). We reject petitioners’ limited reading of the scope of the class exemption. The fact that this transaction is to transfer construction and operation permits for a line that has been authorized by the ICC and the Board to be built and operated in the future does not preclude applicants from invoking the class exemption for this minor transaction that does not require regulation.

In short, we have considered petitioners’ arguments for rejection of the notice of exemption and find them to be without merit. Moreover, petitioners have failed to show that the notice of exemption contains false or misleading information

Revocation of the Exemption.

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation of the transaction at issue is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. See CSX Transp., Inc.--Aban.--In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992); I&M Rail Link, LLC--Acquisition and Operation Exemption--Certain Lines of Soo Line Railroad Company D/B/A/ Canadian Pacific Railway, STB Finance Docket No. 33326 et al., slip op. at 6 (STB served Apr. 2, 1997).

Petitioners have not supported their contention that regulation of this transaction is required by the rail transportation policy. Petitioners argue that, because the 1996 decision⁷ is pending in court, it would be improper for the Board to exempt transfer of the certificates without permission from the court. Petitioners state that they believe that substitution of TRRC Inc. in the construction and operation certificates suggests that the ICC and Board authorization orders should be vacated and the cause should be remanded. Petitioners’ argument lacks merit. Applicants state that once the transfer has been made, TRRC Inc. will take the necessary steps, in accordance with Rule 43(b) of the Federal Rules of Appellate Procedure, to notify the court and effect a substitution of parties.

⁷ A petition for review of the 1996 decision was filed by Northern Plains and others in the United States Court of Appeals for the Ninth Circuit. Northern Plains Resource Council, Inc., et al. v. The Surface Transportation Board, et al., (No. 97-70037). That petition is being held in abeyance pending a final decision by the Board in the Western Alignment proceeding.

This will constitute adequate notice to the court, which is holding its proceedings in abeyance pending the conclusion of the pending application to construct and operate the Western Alignment.

Petitioners also contend that the present noncarrier line acquisition class exemption was designed for the acquisition and/or operation of existing lines of railroad rather than potential line construction. They suggest that, because new rail construction is involved, it is necessary for TRRC Inc. to give a full disclosure of the “certain transactions” it has in mind through a full Board examination, as the 1986 decision and the 1996 decision proceedings were handled. However, applicants correctly note that, while petitioners claim a need for “full disclosure,” petitioners have failed to explain a basis for that need. As applicants explain, the transaction at issue involves only a change in the form of ownership of the company that will construct and operate a line that already has been partially authorized. Moreover, according to Partnership, the financing approaches currently being considered in consultation with its financial advisor, Chase Securities, Inc., require the corporate form of business. In short, as applicants note, the change of TRRC’s ownership from a partnership to a corporation has nothing whatsoever to do with any issue decided by the ICC and the Board in the prior application proceedings or the presently pending Western Alignment proceeding. Moreover, petitioners have shown no reason why the class exemption is not applicable to this particular very limited transaction.

Furthermore, petitioners express concern that TRRC Inc. has represented that it will be the operator of the property.⁸ Applicants reply that the possibility that BNSF may, at some future date, enter into an agreement to operate the TRRC is not germane to this transaction. Applicants add that, if and when an agreement with BNSF is reached, it will be bought before the Board in an appropriate fashion. Thus, petitioners’ concern does not warrant revocation of the exemption.

Finally, Northern Plains contends that changing the form of ownership from a partnership to a corporation would limit a landowner’s or injured citizen’s legal recourse under Montana law should an act of negligence or property damage occur during the construction or operation of the line. Applicants respond that Northern Plains has misconstrued Montana law, maintaining that Partnership is a limited liability partnership (LLP), and that under Montana law a partner of an LLP is not liable, directly or indirectly, for debts, obligations, or liabilities of the LLP or any other partner. Thus, the purported recourse against the partners alleged in Northern Plains’ petition evidently does not exist under Montana law.

Having reviewed all of the evidence and arguments presented by the parties, we find no basis for revocation. Petitioners have not shown a reason to regulate the substitution of the corporate form of business for the partnership form.

⁸ In fact, TRRC Inc. had represented in its notice of exemption that The Burlington Northern and Santa Fe Railway Company (BNSF) may be the operator of the property if an agreement can be reached between the parties.

Neither Northern Plains nor anyone else argues that it took any action or failed to take any action in reliance on the fact that TRRC originally organized itself as a partnership rather than a corporation. It is undisputed that TRRC could have incorporated originally and pursued its application as a corporation. The fact that it has chosen to do so now rather than earlier does not affect that right.

No stay pending judicial review was sought for the 1996 decision, and thus the Board's decision is complete and administratively final. It further appears that Partnership is acting consistent with an intent to exercise the authority granted in the 1996 decision. In these circumstances, petitioners have failed to demonstrate that regulation of this transaction is needed to carry out the rail transportation policy.

Having already addressed the merits of petitioners' requests for rejection or revocation, their requests to stay the operation of the notice of exemption pending our determination of the issues they raise will be dismissed as moot.

This decision will not significantly affect the qualify of the human environment or the conservation of energy resources.

It is ordered:

1. Forsyth/UTU's and Northern Plains' petitions to reject or revoke are denied.
2. Forsyth/UTU's petition to file a reply to a reply is denied.
3. Forsyth/UTU's and Northern Plains' petitions for stay are dismissed as moot.
4. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary